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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BOURNE CO., :

Plaintiff, :

-against- :

TWENTIETH CENTURY FOX FILM :
CORPORATION, FOX BROADCASTING :
COMPANY, TWENTIETH CENTURY FOX :
TELEVISION, INC., TWENTIETH :
CENTURY FOX HOME :
ENTERTAINMENT, INC., FUZZY DOOR :
PRODUCTIONS, INC., THE CARTOON :
NETWORK, INC., SETH MACFARLANE, :
WALTER MURPHY, :

Defendants. :

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07 Civ. 8580 (DAB)

**DEFENDANTS' STATEMENT OF
UNDISPUTED FACTS PURSUANT TO
LOCAL CIVIL RULE 56.1**

Pursuant to Local Civil Rule 56.1 of the United States District Court for the Southern District of New York, defendants Twentieth Century Fox Film Corporation ("Fox Film"), including its unit, Twentieth Century Fox Television ("Fox Television") incorrectly named herein as Twentieth Century Fox Television, Inc., Fox Broadcasting Company ("Fox Broadcasting") and Twentieth Century Fox Home Entertainment LLC ("Fox Home Entertainment"), formerly known as Twentieth Century Fox Home Entertainment, Inc. (referred to herein collectively as the "Fox Defendants" or "Fox"), Fuzzy Door Productions, Inc ("Fuzzy Door"), The Cartoon Network, Inc. ("Cartoon Network"), Seth MacFarlane ("MacFarlane"), and

“Walter Murphy” (“Murphy”) (referred to collectively as “Defendants”), by their attorneys Loeb & Loeb LLP respectfully submit the following statement of undisputed material facts as to which there is no genuine issue to be tried:

“When You Wish Upon a Star” from *Pinocchio*

1. Wish Upon A Star is a popular song written by Ned Washington and Leigh Harline and introduced in the 1940 Walt Disney movie *Pinocchio*,¹ where it is sung by Cliff Edwards in the character of Jiminy Cricket, over the opening credits and again in the final scene of the film. (Cmpl’t ¶ 20.).²

2. The song won the Academy Award for Best Original Song that year (Cmpl’t ¶ 20), and for more than sixty years Walt Disney and his company have taken substantial steps to make Wish Upon A Star its theme song, and to associate the song with Walt Disney in the public mind. (Pltf’s Admission No. 5).³

3. The Song was used in the opening sequences of the Disney anthology television series, “The Wonderful World of Disney” (which, for years, Walt Disney personally introduced), in Walt Disney Pictures’ opening logos, and in television advertisements for its Disneyland theme park. (Pltf’s Admission No. 3).

4. The Song is an integral part of Walt Disney’s and the Walt Disney Company’s personality and reputation. *See Bourne Co. v. Walt Disney Co.*, No. 91 Civ. 0344 (LLS), 1992 WL 170686, at *8 (S.D.N.Y. July 1, 1992).

¹ A copy of Walt Disney’s *Pinocchio* on DVD is attached to the accompanying declaration of Seth MacFarlane as Exhibit B.

² All citations to the record herein are in the same format as the citations in the accompanying Defendants’ Memorandum of Law.

³ Plaintiff’s Responses to Defendant Twentieth Century Fox Film Corporation’s First Request for Admissions, dated February 27, 2008, is attached to the accompanying declaration of Jacques Rimokh (“Rimokh Dec.”) as Exhibit A.

The Family Guy TV Series and “When You Wish Upon A Weinstein” Episode

5. Family Guy is a half-hour, animated, comedy television series, created by Seth MacFarlane, and televised on primetime and late-night cable television. (MacFarlane Dec. ¶ 2). The series was first televised in 1999 and is now in its seventh season. (MacFarlane Dec. ¶ 2).

6. The show often parodies icons from popular culture through the exploits of the Griffin family (father Peter, mother Lois, son Chris, matricidal baby son Stewie, daughter Meg, and talking dog Brian) that lives in the fictional town of Quahog, Rhode Island. (MacFarlane Dec. ¶ 2).

7. Family Guy is known for its frequent parodies of popular TV shows, movies, songs and celebrities. (MacFarlane Dec. ¶ 2). The show routinely puts cartoon versions of celebrities and famous characters in awkward and ridiculous situations in order to lampoon and parody those figures and to poke fun at society’s general fascination with celebrity and pop culture. (MacFarlane Dec. ¶ 2).

8. The show is also known for parodying obscure movies, TV shows or other cultural phenomena from the past. (MacFarlane Dec. ¶ 2). The series follows a pattern of irreverent, iconoclastic plotlines, cutting-edge dialogue, and wildly non sequitur pop-cultural references. (MacFarlane Dec. ¶ 2).

9. The Family Guy episode titled “When You Wish Upon A Weinstein” was produced in 2000.⁴ (Cmplt. ¶ 3). The Episode is centered around the father, Peter, and his inability to manage his family’s finances. (Cmplt. ¶ 3; MacFarlane Dec. ¶ 6). This is

⁴ A copy of the home video release version of the Episode is attached to the accompanying declaration of Seth MacFarlane as Exhibit A. Due to issues raised by the Broadcast Standards (also referred to in some companies as the Standards and Practices) department, which determines for each broadcaster what content is or is not appropriate based upon their own respective guidelines, an alternate version of the Family Guy Song was included in certain telecasts of the Episode. The only difference is that in the alternate version the lyric “Even though they killed my Lord” is replaced with “I don’t think they killed my Lord.”

exemplified in the beginning of the Episode when Peter is convinced by a traveling salesman to purchase volcano insurance. (MacFarlane Dec. ¶ 6). After hearing his friends talk about how men with Jewish-sounding names have helped them achieve financial success, Peter decides that he needs a Jew to help him with his finances. (MacFarlane Dec. ¶ 6).

10. After a Jew “miraculously” appears and helps him with his financial problems, Peter follows his racial stereotypes to an even more absurd end by taking his son Chris to get a “quickie” Bar Mitzvah in Las Vegas so that he will become Jewish and be smart and successful. (MacFarlane Dec. ¶ 6). In a scene that parodies the famous ending scene from the 1960s film “The Graduate,” Lois rushes in to stop Chris, and explains to Peter the error of his ways. (MacFarlane Dec. ¶ 6). At the end, Peter says to Lois: “I see what you’re saying. The Jewish are just like us. No better, no worse.” (MacFarlane Dec. ¶ 6).

11. The overall theme of the Episode is that Peter’s beliefs based upon racial stereotypes, even potentially “positive” ones, are ridiculous and that no group of people is any better or worse than another based upon their race or cultural heritage. (MacFarlane Dec. ¶ 7; Blitt Dec. ¶ 3).

12. Just one of the comedic values present is that although this an obvious concept, it was not obvious to Peter. In the end, Peter had to learn this obvious lesson and the Episode illustrates Peter’s ignorance. (MacFarlane Dec. ¶ 7). Before Peter learns this lesson he sings “I Need A Jew,” which evokes and parodies Wish Upon A Star. (Zuckerman Dec. ¶ 5). In the Family Guy Song, Peter makes a magical wish “upon a star” for a Jew to come and help solve his financial problems. (Zuckerman Dec. ¶ 5).

13. Fox Broadcasting initially decided not to televise the Episode as part of season two, after it had completed postproduction, due to concerns at that time about the potentially

controversial religious content of the Episode. (MacFarlane Dec. ¶ 5). The Episode, including the Family Guy Song, was first distributed on home video by Fox Home Entertainment on or about September 9, 2003 as part of the Family Guy “Volume 2, Season 3” DVD box set, which has remained on sale since that time. (Cmpl’t ¶ 28). The Episode was first telecast by the Cartoon Network’s Adult Swim programming service on November 9, 2003 (Cmpl’t ¶ 27) and was repeatedly telecast thereafter. (MacFarlane Dec. ¶ 5). The Episode was ultimately televised by Fox Broadcasting on December 10, 2004. (MacFarlane Dec. ¶ 5). The Episode was also distributed on DVD by Fox Home Entertainment on or about December 14, 2004 as part of the “Family Guy-The Freakin’ Sweet Collection” DVD, which has also been on sale since that time. (Cmpl’t ¶ 28).

The Family Guy Song

14. The Family Guy Song was purposely created in a manner intended to evoke Wish Upon A Star for parodic purposes. (MacFarlane Dec. ¶¶ 8, 13; Zuckerman Dec. ¶ 6).

15. Defendants initially sought a license from Plaintiff to use Wish Upon A Star in their parody song. (MacFarlane Dec. ¶ 12). A copy of the proposed parody lyrics was sent to Plaintiff as part of the request. Plaintiff refused to issue a license for the proposed use. (MacFarlane Dec. ¶ 12).

16. Defendants continued with their creation and use of Family Guy Song, without Plaintiff’s approval, because they were comfortable that they were creating a fair use parody of Wish Upon A Star. (MacFarlane Dec. ¶ 13). For example, among other transformative changes, the creators changed the melody of the Family Guy Song to evoke – rather than be the same as – the melody of Wish Upon a Star. (E.g., MacFarlane Dec. ¶ 13).

17. Family Guy Song was intended to, and obviously does, parody Wish Upon A Star in several ways. (Zuckerman Dec. ¶ 6). The writers intended to evoke and parody the “saccharine sweet,” “innocent” and “wholesome” worldview presented in and represented by Wish Upon A Star, by having Peter absurdly “wish upon a star” in a decidedly impure and unsavory manner based on his ignorant stereotypes. (MacFarlane Dec. ¶ 8; Zuckerman Dec. ¶ 6; Blitt Dec. ¶¶ 5, 6).

18. The Episode visually carries through and furthers the parody by placing Peter in a pose that emulates that of the toymaker Gepetto, sitting by the window sill gazing up at sparkling stars wishing for a “real boy” while the music for Wish Upon A Star plays in the background. (See *Pinocchio* at time code 13:10 – 13:20; Episode at time code 6:00 – 6:20.). (See copies of video screen captures depicting these referenced scenes, MacFarlane Dec. 8, Exhibit C)

19. In further parodying the fantasy world of *Pinocchio* and Wish Upon A Star, the Episode absurdly inserts and juxtaposes Peter’s ridiculous racial stereotypes into the fantasy world by, among other things, depicting the Jews as magical creatures that come to Peter in the form of a magical spaceship that turns into a flying dreidel. (MacFarlane Dec. ¶ 9)

20. The writers were also well-aware of Walt Disney’s public reputation as an Anti-Semite. (MacFarlane Dec. ¶ 10; Zuckerman Dec. ¶ 6). The writers believed that by evoking Wish Upon A Star, the song most associated with Walt Disney and his company, in their parody song where Peter wishes for a Jew to help him, they could comment on the song while simultaneously making a sharp point about Walt Disney’s reputed anti-Semitism. (MacFarlane Dec. ¶ 10; Zuckerman Dec. ¶ 6).

21. The Family Guy Song has never been sold on its own (MacFarlane Dec. ¶ 15), apart from the Episode, and by the Plaintiff’s own admission, has not caused any market harm to


“When You Wish Upon the Star.” (Bourne Dep. 25-26, 27-30, 37-38, 60). The Family Guy Song could not be a substitute for Wish Upon a Star. (Bourne Dep. 25-26, 27-30, 37-38, 60).

22. There is no evidence whatsoever that the Family Guy Song has harmed the market for Wish Upon a Star. (Bourne Dep. 40).

23. Plaintiff, a major music publisher, did not even learn about the Episode and the Family Guy Song until almost four years after its repeated nationwide telecasts (more than 35 times) and release on home video. (Bourne Dep. 19-21).

Dated: New York, New York
April 18, 2008

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